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**FEDERAL ELECTION COMMISSION**

**999 E Street, N.W.**

**Washington, D.C. 20463**

2005 JUN -6 A 11: 53

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 5546

DATE COMPLAINT FILED: September 29, 2004

DATE OF NOTIFICATION: October 5, 2004

DATE ACTIVATED: November 3, 2004

EXPIRATION OF SOL: June 24, 2009

**COMPLAINANT:**

Steven C. Russo

**RESPONDENTS:**

Progress for America Voter Fund

Brian McCabe, as President

Mary Anne Carter, in her official capacity as Treasurer

Ralph R. Brown, as Secretary

Progress for America, Inc.

The Leadership Forum

Susan B. Hirschmann, as President

L. William Paxon, as Vice President

Barbara Bonfiglio, in her official capacity as Treasurer

Bush-Cheney '04, Inc. and

David Herndon, in his official capacity as Treasurer

President George W. Bush

Vice President Richard B. Cheney

Republican National Committee

Mike Retzer, in his official capacity as Treasurer

**RELEVANT STATUTES:**

2 U.S.C. § 434

2 U.S.C. § 441a(a)(7)(B)(i)

2 U.S.C. § 441i(e)(1)(A)

11 C.F.R. § 109.20

11 C.F.R. § 109.21

**INTERNAL REPORTS CHECKED:**

Disclosure reports; Commission indices

**FEDERAL AGENCIES CHECKED:**

Internal Revenue Service

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**I. INTRODUCTION**

The Complaint alleges that Progress for America Voter Fund (PFA-VF) and The Leadership Forum (TLF) made illegal in-kind coordinated contributions to Bush-Cheney '04, Inc. and the Republican National Committee ("RNC").<sup>1</sup> Specifically, the Complaint asserts the alleged coordination occurred in four separate ways. First, Complainant asserts that Bush-Cheney '04, Inc. and the RNC, in commenting in May 2004 on a delay in a Federal Election Commission rulemaking that would regulate Section 527 organizations, sent various conservative groups, including PFA-VF and TLF, a clear "signal" to begin raising nonfederal money to influence the 2004 Presidential Election.<sup>2</sup> See Complaint at p.3. Second, the Complaint alleges that Bush-Cheney '04 personnel made a presentation at a 2003 briefing sponsored by a 501(c)(4) organization that was later listed as a connected organization in PFA-VF's initial filings with the IRS. Third, Complainant asserts that various individuals and groups who support PFA-VF and/or TLF also support Bush-Cheney '04 and/or the RNC. Finally, Complainant asserts that PFA-VF may have coordinated its expenditures by utilizing the services of a direct mail and phone bank specialist named Tom Synhorst whose company, Feather, Larson & Synhorst, was a major vendor to both Bush-Cheney '04 and the RNC. Although the first three

<sup>1</sup> PFA-VF and TLF are organized under Section 527 of the Internal Revenue Code, and are not registered with the Commission. By law, a 527 organization is "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of Presidential or Vice Presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another. Indeed, the Commission currently has ongoing investigations into whether PFA-VF and TLF's 2004 activity may have triggered political committee status. See First General Counsel's Reports in MURs 5487 (PFA-VF)

<sup>2</sup> The May 13, 2004 Joint Statement by the Bush-Cheney Campaign and the RNC declared that "[c]onservative groups now have the go-ahead they were waiting for" and that "[g]roups like the Leadership Forum, Progress for America, and others now know that they can legally engage in the way Democrat leaning groups like other groups] have been engaging." *Id.* (Emphasis added)

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1 assertions are insufficient to support a finding of coordination, the fourth assertion, which relates  
2 only to PFA-VF activities, appears to be substantiated by public records and merits further  
3 inquiry.

4 Based on the facts as presented in the Complaint, the responses, as well as other available  
5 information, this Office recommends that the Commission find reason to believe that PFA-VF  
6 violated 2 U.S.C. § 441a(A)(1)(a) in order to investigate the allegations, but take no action at this  
7 time as to its individual officers; find no reason to believe that TLF or its individual officers  
8 violated the Act by making coordinated expenditures; and take no action at this time with respect  
9 to Bush-Cheney '04, Inc., the RNC and their respective individual officers and candidates.

## 10 II. FACTUAL AND LEGAL ANALYSIS

### 11 A. FACTS

#### 12 1. The Leadership Forum

13  
14 The Leadership Forum (TLF) is a Section 527 organization which does not maintain a  
15 federal account and is not registered with the Commission. It was founded on October 28, 2002  
16 with substantial assistance from the National Republican Congressional Campaign Committee  
17 (NRCC).<sup>3</sup> Susan Hirschmann, its President (former chief of staff to Tom Delay), Bill Paxon, its  
18 Vice President (former chairman of the NRCC), and Barbara Bonfiglio, its Treasurer, are all  
19 identified by the Complainant as respondents in this Matter.<sup>4</sup>

<sup>3</sup> Most of the NRCC's involvement occurred prior to November 6, 2002 and, therefore, cannot be considered when determining if the NRCC established, financed, maintained, or controlled TLF. *See* 11 C.F.R. § 300.2(c)(3); *see also* MUR 5338 (Commission found no reason to believe TLF was established, financed, maintained, or controlled by the NRCC because there was no evidence of post-November 2002 NRCC involvement).

<sup>4</sup> Although the Leadership Forum's officers and advisory board include former Members of Congress, former aides to Republican Party leaders, and others with extensive connections to the national party leadership, the Advisory Board does not participate in decisions concerning the expenditure of funds. In addition, TLF's Articles of Incorporation forbid it from employing or receiving services from any employee of a federal candidate or a political party or from authorizing candidates for federal office or their agents to solicit soft money for the organization

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1 In its amended Section 527 organization Post-General Election Report filed with the IRS  
2 on January 31, 2005, The Leadership Forum reported \$139,893 in receipts and \$429,236 in  
3 disbursements for the period from October 14, 2004 through November 22, 2004.  
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10 In its Response to the Complaint in this matter, TLF acknowledges support it received  
11 from various current and former Republican Party officials (including current and former federal  
12 officeholders), and cites the Commission's conclusions in MUR 5338 as to whether the  
13 organization was established, financed, maintained or controlled by a national party committee  
14 (the NRCC) to argue that the past associations of its officer and supporters, standing alone, do  
15 not support an allegation of coordination. TLF claims to focus on nonfederal activities and  
16 denies coordinating any of its activities with Bush-Cheney '04, Inc. or the RNC.  
17  
18

19 **2. Progress for America Voter Fund**

20 Progress for America Voter Fund (PFA-VF) also is a Section 527 organization that does  
21 not maintain a federal account and is not registered with the Commission. PFA-VF was formed  
22 on May 27, 2004. Brian McCabe, as President, Mary Anne Carter, as Treasurer, and Ralph R.  
23 Brown, as Secretary all have been identified by the Complainant as Respondents in this MUR.

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1 Progress for America, Inc., a non-profit corporation previously organized under Section  
2 501(c)(4) of the tax code, is listed on PFA-VF's IRS 8871 form as a connected entity of  
3 PFA-VF.<sup>5</sup>

4 In its Post-General Election Report filed with the IRS on December 2, 2004, PFA-VF  
5 reported \$7,031,973 in receipts and \$6,628,627 in disbursements for the period from October 14,  
6 2004 through November 22, 2004. PFA-VF also filed numerous electioneering communication  
7 reports with the Commission during the Fall of 2004 for millions of dollars in broadcast  
8 advertisements that promoted or supported Republican Presidential nominee President Bush  
9 and/or attacked or opposed Democratic Presidential nominee John Kerry.

10 In its Response to the Complaint in this matter, PFA-VF challenges the sufficiency of the  
11 allegations set forth in the Complaint and, without addressing any of the specific factual  
12 allegations, denies that any of its activities were coordinated with Bush-Cheney '04, Inc. or the  
13 RNC.

### 14 3. Bush-Cheney '04, Inc. and The RNC

15 Bush-Cheney '04, Inc. (Bush-Cheney) was the principal campaign committee for the  
16 re-election of President George W. Bush and Vice President Richard Cheney, who are identified  
17 as Respondents in the Complaint. David Herndon is the Treasurer of Bush-Cheney. In their  
18 Response to the Complaint, Bush-Cheney and David Herndon deny any coordination with either  
19 TLF or PFA-VF. These Respondents state that the joint press release at issue in this Matter is  
20 not a "call to action" to 527 organizations but rather a criticism of the Commission's failure to  
21 regulate 527 organizations as political committees. Regarding the allegation that all of PFA-

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<sup>5</sup> According to the Complaint, officials of Bush-Cheney '04 once made a presentation at a 2003 event sponsored by Progress for America, Inc. that took place prior to the formation of PFA-VF. This appears to be the sole basis for the Complaint to identify this connected Section 501(c)(4) organization as a respondent in this matter.

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VF's advertisements were "coordinated" public communications with Bush-Cheney because of presentations made by Ken Mehlman and Karl Rove to Progress for America, Inc., these Respondents state that PFA-VF had not even been created at the time of the presentations, so it would have been impossible to meet the "substantial discussions" and "material involvement" tests required by 11 C.F.R. § 109.21.

With respect to the allegation regarding the overlap of personnel between TLF and PFA-VF and on the one hand, and Bush-Cheney '04 Inc. on the other hand, Bush-Cheney '04 Inc. states that none of the individuals associated with TLF and PFA-VF named in the Complaint had access to the Bush-Cheney campaign strategy or the "plans, projects, activities, or needs" that was not publicly available. *See* 11 C.F.R. § 109.21.

Finally, with regard to the allegations of coordination involving PFA-VF and Feather, Larson & Synhorst ("FLS"), an organization in which Tom Synhorst is a named partner, Bush-Cheney states that its contract with FLS states "[FLS] agrees to comply with all local state and federal regulations relating to their activities . . ." and that it "relies on FLS's representations that it is in compliance with the [Bipartisan Campaign Finance Reform] Act and Commission Regulations." Response at p. 4.

In their Response, the RNC and its Treasurer Michael Retzer argue that "[a] mere summary of Commission action in a public press release fails the coordination test, namely that a specific expenditure was made at the 'request or suggestion' of a candidate or his agent." The RNC also incorporates by reference its Response to the Complaint in MUR 5525.

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**B. ANALYSIS**

**1. Summary of Coordination Law**

Under the Act, an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate or party committee constitutes an in-kind contribution. *See* 2 U.S.C. §§ 441a(a)(7)(B)(i) and (ii). The regulations that implement the preceding statutory provisions define “coordinated” and prescribe the treatment of a “coordinated” expenditure as an in-kind contribution. *See* 11 C.F.R. § 109.20(a) and (b).

Although the definition of “coordinated” in Section 109.20 potentially encompasses a variety of payments made by a person on behalf of a candidate or party committee, many issues regarding coordination involve communications. The Commission therefore has promulgated separate regulations addressing “coordinated communications.” 11 C.F.R. §§ 109.21-109.23. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test:

- (1) the communication is paid for by a person other than that candidate, authorized committee, political party committee, or agent thereof;
- (2) the communication satisfies at least one of the four “content” standards described in Section 109.21(c);<sup>6</sup> and
- (3) the communication satisfies at least one of the six “conduct” standards described in Section 109.21(d).

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<sup>6</sup> In *Shays v. FEC*, 337 F.Supp. 2d 28, (D.D.C. 2004) (D.D.C. Sept.18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court’s opinion. In a subsequent ruling, the Court explained that the “deficient rules technically remain ‘on the books,’” and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39 (D.D.C. Oct.19, 2004).

2. **Alleged Coordination by TLF and PFA-VF**

a. The Payment Standard

The standard for payment by a party other than a candidate, authorized committee, political party, or agent thereof would, by definition, be satisfied by any communications paid for by PFA-VF or TLF.

b. The Content Standard

The "content" standard includes: (1) an "electioneering communication;" (2) a "public communication" that disseminates campaign materials prepared by a candidate; (3) a communication that "expressly advocates" the election or defeat of a clearly identified federal candidate; and (4) certain "public communications," distributed 120 days or fewer before an election, which refer to a clearly identified federal candidate (or political party). 11 C.F.R. § 109.21(c).<sup>7</sup>

Due to the District Court opinion as to the validity of the content standard in *Shays v. FEC*, on which the appeal to the D.C. Circuit is pending, this does not end the coordination analysis as to TLF.

On the other hand, while discovery is ongoing in MUR 5487, the materials received to date substantiate that most, if not all, of PFA-VF's communications would meet either the first

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<sup>7</sup> Generally, the absence of any type of content described in Section 109.21(c) is fatal to an allegation of coordinated communications. See AO 2003-25 (Weinzapfel) (no coordinated communication where television advertisement was neither an electioneering communication, prepared by the candidate, express advocacy, nor distributed within 120 days of a federal election, and therefore did not meet any "content" standard).



(electioneering communication) or fourth ("public communications" mentioning a candidate within 120 days of an election) subparts of the content standard.

For example, the following television advertisement entitled "Finish It" was paid for by PFA-VF:<sup>8</sup>

Audio	Visual
<b>ANNOUNCER:</b> These people want to kill us.	<i>On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers and victims of terrorist attacks.</i>
They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans.	<i>On screen: Pictures showing 9/11 attack on Twin Towers and terrorist attacks in Russia and Spain</i>
John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.	<i>On screen: Still Picture of Kerry; 30 years cuts in defense and intelligence</i>
Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.	<i>On screen: Would you trust Kerry? Pictures of President Bush addressing the US military</i>
Progress for America Voter Fund is responsible for the content of this message.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>

PFA-VF reportedly spent \$15 million on the Ashley's Story ad below,<sup>9</sup> which, according to surveys, made one of the strongest impressions on voters in key states<sup>10</sup>:

<sup>8</sup> Jeanne Cummings, *Who Funded That Negative Ad?*, WALL ST. J., July 7, 2004, at A4. Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-03.mplarge.wmv>.

<sup>9</sup> <http://www.washingtonpost.com/wp-dyn/articles/A28697-2004Nov5.html>; Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

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Audio	Visual
<b>LYNN FAULKNER:</b> My wife, Wendy, was murdered by terrorists on Sept. 11.	<i>On screen: Lynn Faulkner; picture of Wendy Faulkner with her two daughters</i>
<b>ANNOUNCER:</b> The Faulkners' daughter Ashley closed up emotionally. But when President George W. Bush came to Lebanon, Ohio, she went to see him as she had with her mother four years before.	<i>On screen: picture of Ashley reading a book; Bush at a campaign rally in Ohio</i>
<b>LINDA PRINCE:</b> He walked toward me and I said, "Mr. President, this young lady lost her mother in the World Trade Center."	<i>On screen: Linda Prince; Family Friend</i>
<b>ASHLEY FAULKNER:</b> And he turned around and he came back and he said, "I know that's hard. Are you all right?"	<i>On screen: Ashley Faulkner</i>
<b>LINDA PRINCE:</b> Our President took Ashley in his arms and just embraced her. And it was at that moment that we saw Ashley's eyes fill up with tears.	<i>On screen: President Bush embracing Ashley Faulkner</i>
<b>ASHLEY FAULKNER:</b> He's the most powerful man in the world and all he wants to do is make sure I'm safe, that I'm OK.	<i>On screen: Lynn Faulkner; picture of President Bush with a fire fighter</i>
<b>LYNN FAULKNER:</b> What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.	<i>Footage of a newspaper with President Bush embracing a girl captioned "Bush comforts daughter of 9/11 victim"</i>
<b>ANNOUNCER:</b> Progress for America Voter Fund is responsible for the content of this message.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>

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<sup>10</sup> <http://www.washingtonpost.com/wp-dyn/articles/A29189-2004Nov5.html>

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1 In thirty electioneering communications reports filed with the Commission, PFA-VF  
2 listed \$72,070,250 in donations received and \$29,810,435 in electioneering communications  
3 made covering the period from June 23 through October 29, 2004. It appears that PFA-VF's  
4 primary activity was to fund television advertisements that clearly identified then-Republican  
5 Presidential candidate George Bush, then-Democratic Presidential Candidate John Kerry, or  
6 both.<sup>11</sup> All of the PFA-VF advertisements praised the quality of Bush's leadership as President  
7 after September 11, 2001 and questioned Senator Kerry's ability to provide similar leadership.  
8 The thirty electioneering communications reports PFA-VF filed with the Commission listed just  
9 two candidates, President Bush and Senator John Kerry. There was no information on the  
10 PFA-VF website about any other candidate for federal, state or local office.

11 Because PFA-VF reported spending millions of dollars for electioneering  
12 communications that satisfy the "content" standard, an analysis of the "conduct" standard is  
13 required to assess whether there is reason to believe any of the expenditures were coordinated.

14 c. The Conduct Standard

15 Any one of six "conduct" standards will satisfy the third element of the three-part  
16 coordination test, "whether or not there is agreement or formal collaboration." 11 C.F.R.  
17 §§ 109.21(d) and 109.21(e). These conduct standards include: (1) communications made at the  
18 "request or suggestion" of the relevant candidate or committee; (2) communications made with  
19 the "material involvement" of the relevant candidate or committee; (3) communications made  
20 after "substantial discussion" with the relevant candidate or committee; (4) specific actions of a  
21 "common vendor;" (5) specific actions of a "former employee;" and (6) specific actions relating  
22 to the dissemination of campaign material. 11 C.F.R. §§ 109.21(d)(1)-(6).

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<sup>11</sup> See <http://www.pfavoterfund.com/> for audio and video and Attachment 1 for additional ad transcripts.

Despite the Complainant's assertions relating to each of the first four prongs of the "content" standards, it is only the fourth prong, actions taken through a "common vendor," which may warrant further investigation in this matter.

1. Request or Suggestion

The Complainant alleges that the joint press release by the Chairman of Bush-Cheney '04 and the RNC Chairman constituted a signal that qualifies as a "request or suggestion" for ensuing activity, but this Office does not agree. The joint press release regarding developments in the Commission's rulemaking noted that conservative Section 527 groups might now take the same type of action as those already taken by liberal Section 527 groups, and predicted such a result. However, this Office views the statement, without information indicating it was part of a series of communications which could be considered in combination with the Bush-Cheney/RNC press release, as being too vague or general to constitute the sole basis for meeting the "request or suggestion" conduct standard. While the Complainant interprets the statement as a "request or suggestion," it also could have been interpreted, as argued by the Respondents, as simply a comment on a public issue.

As a result, and in the absence of any other information that would constitute activity by TLF that might meet one of the conduct standards, this Office recommends that the Commission find no reason to believe that The Leadership Forum, Susan B. Hirschmann, as President, L. William Paxon, as Vice President and Barbara Bonfiglio, as Treasurer violated any provision of the Act in connection with allegedly coordinated expenditures.

The Complaint also cites a presentation that Bush-Cheney officials purportedly made to PFA-VF's connected organization, Progress for America, Inc., in 2003; however, the Complainant provides no information which indicates that this presentation constituted a

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1 “request or suggestion” for any particular course of action, or that any of the officials later  
2 involved with PFA-VF’s communications were in attendance at this presentation. In addition, as  
3 Bush-Cheney’s Response asserts, this presentation did not include any information about its  
4 campaign’s plans, projects or needs.

5 2. Common Vendor

6 It appears that PFA-VF and Bush-Cheney utilized a common vendor. The Complaint  
7 alleges that Tom Synhorst, a direct-mail and phone-bank specialist, is a key strategic adviser to  
8 PFA-VF and is also partner in a firm that has major contracts with both Bush-Cheney and the  
9 RNC. Publicly available information reveals that Bush-Cheney and the RNC disbursed millions  
10 of dollars to Feather, Larson & Synhorst (FLS) during 2004. Public information also indicates  
11 that PFA-VF disbursed hundreds of thousands of dollars to FYI Messaging, LLC and DCI  
12 Group, LLC, two limited liability corporations registered in the State of Arizona under  
13 Synhorst’s name.

14 The “common vendor” subpart of the “conduct” standard regulation requires “[t]hat  
15 commercial vendor, including any owner, officer, or employee of the commercial vendor” to  
16 have provided one of the specified types of services discussed below. 11 C.F.R. § 109.21(d)(4).  
17 The applicable rules defining common vendors emphasize substance over form; where entities  
18 such as FLS, FYI Messaging and DCI Group appear to be closely related, including possible  
19 overlapping personnel (such as Mr. Synhorst), their particular organizational form will not  
20 prevent an investigation of whether the entities used information in the same manner as a  
21 common vendor. See 11 C.F.R. § 109.21(d)(4).

22 In explaining its regulation, the Commission explicitly addressed situations such as  
23 Mr. Synhorst’s apparent simultaneous involvement with FLS and its work for Bush-Cheney and

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1 his involvement with FYI Messaging and DCI Group and their work for PFA-VF in which "a  
2 commercial vendor may qualify as a common vendor under 11 C.F.R. § 109.21(d)(4) even after  
3 reorganizing or shifting personnel." Explanation & Justification ("E&J"), 68 Fed. Reg. 421, 435  
4 (Jan. 3, 2003). The Commission stated the regulation "focus[es] on the use or conveyance of  
5 information used by a vendor, including its owners, officers, and employees, in providing  
6 services to a candidate [or committee], rather than the particular structure of the vendor." *Id.*

7 Three elements must be present for a commercial vendor to be defined as a "common  
8 vendor" under 11 C.F.R. § 109.21(d)(4). First, the person paying for the communication must  
9 have employed or contracted with a commercial vendor to create, produce, or distribute the  
10 communication. 11 C.F.R. § 109.21(d)(4)(i). DCI Group, LLC is a lobby and public relations  
11 firm. Brian McCabe, President of PFA-VF is a former DCI employee. FYI Messaging is a  
12 direct-mail firm associated with DCI Group. Both organizations were founded by Thomas  
13 Synhorst and are engaged in the regular business of media consulting and advertising production;  
14 thus, they qualify as commercial vendors. 11 C.F.R. § 116.1(c).

15 Second, that commercial vendor must have provided any of certain enumerated services  
16 to the clearly identified candidate during the current election cycle. 11 C.F.R. § 109.21(d)(4)(ii).  
17 Based on disclosure reports, both Bush-Cheney and the RNC paid FYI Messaging and DCI  
18 Group millions of dollars in 2003. Given the publicly advertised nature of their services, these  
19 two organizations appear to have provided the type of services to Bush-Cheney, including  
20 development of media strategies, developing the content of public communications, producing  
21 public communications, identifying voters or developing voter lists, mailing lists or donor lists,  
22 and media consulting, that would qualify under the common vendor regulations. 11 C.F.R.  
23 § 109.21(d)(4)(ii)(A), (E), (F), (G) and (I).

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1 Finally, that commercial vendor must have used or conveyed to the person paying for the  
2 communication:

3 (A) Information about the clearly identified candidate's campaign plans, projects,  
4 activities or needs . . . and that information is material to the creation, production, or  
5 distribution of the communication; or (B) Information used previously by the commercial  
6 vendor in providing services to the candidate who is clearly identified in the  
7 communication, or his or her authorized committee, . . ., or an agent of the foregoing, and  
8 that information is material to the creation, production, or distribution of the  
9 communication.

10  
11 11 C.F.R. § 109.21(d)(4)(iii). With regard to the allegations of coordination involving PFA-VF  
12 and Feather, Larson & Synhorst ("FLS"), Bush-Cheney '04 Inc. appears to rely on its contract  
13 with FLS to ensure that it has not violated BCRA and Commission regulations. Although there  
14 is no indication that FLS took steps to isolate its activities from similar activities performed by  
15 FYI Messaging and DCI Group, the Commission has stated it "does not agree that the mere  
16 existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the  
17 enforcement of the limits on coordinated communications imposed by Congress" because such  
18 "arrangements are unlikely to prevent the circumvention of the rules." E&J, 68 Fed. Reg. 421,  
19 435 (Jan. 3, 2003).

20 Because the first two parts of the "common vendor" test are met, there appears to be a  
21 sufficient basis to investigate whether the use or exchange of information occurred as described  
22 in 11 C.F.R. § 109.21(d)(4)(iii). If it did, all three parts of the coordination test will be met, and  
23 a portion of the costs of the coordinated communications would be a contribution from PFA-VF  
24 to Bush-Cheney. 2 U.S.C. § 441a(a)(7)(B)(i). Any portion of such coordinated expenditure  
25 which exceed \$2,000 also would constitute an excessive contribution in violation of 2 U.S.C.  
26 § 441a(a)(1)(A).

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d. Conclusion

This Office recommends that the Commission find reason to believe that Progress for America Voter Fund ("PFA-VF") violated 2 U.S.C. § 441a(a)(1)(A). Given the lack of available information of their specific roles with regard to the possible coordination through a common vendor, this Office recommends that the Commission take no action at this time with regard to the related Section 501(c)(4), Progress for America, Inc., or the following PFA-VF officers in their personal capacities Brian McCabe, President; Mary Anne Carter, Treasurer; and Ralph R. Brown, Secretary.

An in-kind contribution resulting from a coordinated communication through a common vendor is not considered received or accepted by the candidate or committee with whom or which the communication was coordinated unless that candidate engaged in conduct described in 11 C.F.R. § 109.21(d)(1)-(3). 11 C.F.R. § 109.21(b)(2). At this juncture, there is insufficient information showing that Bush-Cheney or the RNC engaged in the conduct described in 11 C.F.R. § 109.21(d)(1)-(3).

Accordingly, this Office recommends that the Commission take no action at this time regarding Bush-Cheney '04, Inc. and David Herndon, in his official capacity as Treasurer, President George W. Bush, Vice President Richard B. Cheney, and the Republican National Committee and Mike Retzer, in his official capacity as Treasurer.

**III. PROPOSED DISCOVERY**



**IV. RECOMMENDATIONS**

1. Find no reason to believe The Leadership Forum, Susan B. Hirschmann, as President, L. William Paxon, as Vice President and Barbara Bonfiglio, as Treasurer violated any provision of the Act by making prohibited or excessive in-kind contributions in the form of coordinated expenditures to Bush-Cheney '04 or the Republican National Committee;
2. Find reason to believe Progress for America Voter Fund violated 2 U.S.C. § 441a(a)(1)(A);
3. Take no action at this time as to Progress for America, Inc. or PFA-VF President Brian McCabe, PFA-VF Treasurer Mary Anne Carter, and PFA-VF Secretary Ralph R. Brown;
4. Take no action at this time as to Bush-Cheney '04, Inc., and David Herndon, in his official capacity as Treasurer, President George W. Bush, Vice President Richard B. Cheney, The Republican National Committee and Mike Retzer, in his official capacity as Treasurer;
5. Approve the attached Factual and Legal Analysis;
- 6.

7. Approve the appropriate letters.

Lawrence H. Norton  
General Counsel

Date

6/16/25

BY:

Rhonda J. Vosdigh  
Associate General Counsel

Mark Shonkwiler  
Assistant General Counsel

April J. Sands  
Attorney

Attachments:

1. Factual Appendix
2. Factual and Legal Analysis for PFA-VF

# **PROGRESS FOR AMERICA VOTER FUND**

## **I. LEGAL STRUCTURE**

- o Progress for America Voter Fund ("PFA-VF") is an entity organized under § 527 of the IRC.<sup>1</sup> PFA-VF lists PFA as a connected entity.<sup>2</sup> PFA-VF amended their IRS filing to include Progress for America, Inc. ("PFA, Inc.") as a connected entity.<sup>3</sup> It is not clear if there is any difference between PFA and PFA, Inc.
- o PFA-VF is not registered with the Commission as a political committee.<sup>4</sup> However, PFA-VF has filed several EC reports with the Commission.<sup>5</sup>

## **II. DATE ORGANIZED**

- o PFA-VF was formed on May 28, 2004.<sup>6</sup>

## **III. MISSION STATEMENT**

- o "PFA-VF is dedicated to educating the American people regarding the public policy positions of candidates for federal, state and local office and mobilizing conservative voters."<sup>7</sup>
- o "Progress for America Voter Fund ... is a conservative issue advocacy organization dedicated to keeping the issue record straight on the campaign trail and serving as a 'Political Truth Squad'."<sup>8</sup>

## **IV. SUMMARY OF ACTIVITIES AND PUBLIC STATEMENTS**

- o "With the assistance of liberal extremists like George Soros, liberal 527 political committees, (such as MoveOn.org, Americans Coming Together and The Media Fund) have already spent millions of dollars on vicious TV ads attacking President Bush. ... PFA formed a new 527 committee named the Progress for America Voter Fund (PFA-VF), which was immediately identified by The Washington Post as the primary vehicle to counter the efforts of liberal 527 committees."<sup>9</sup>
- o The PFA-VF website lists commercials released by MoveOn.org and The Media Fund, which the website lists as "opposition media."<sup>10</sup>

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<sup>1</sup> <http://www.pfavoterfund.com/1151-95.html>

<sup>2</sup> IRS 8871 filed May 28, 2004.

<sup>3</sup> Amended IRS 8871 filed July 13, 2004.

<sup>4</sup> See FEC Filings

<sup>5</sup> <http://herndon1.sdrdc.com/cgi-bin/fecimg/?C30000079>

<sup>6</sup> IRS 8871 filed May 28, 2004; <http://www.progressforamerica.com/pfa/wrapper.jsp?PID=1101-165&CID=1101-061706C>

<sup>7</sup> <http://www.progressforamerica.com/pfa/>, IRS 8871 filed May 28, 2004

<sup>8</sup> <http://www.pfavoterfund.com/1151-95.html>

<sup>9</sup> <http://www.pfavoterfund.com/1151-15.1151-061104A.html>

<sup>10</sup> <http://www.pfavoterfund.com/1151-40.html#>

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- o "PFA-VF is currently producing issue advocacy TV ads on President Bush's plan to revitalize the American economy and wage a world wide war on terror. Other PFA-VF television ads will expose John Kerry's record as the most liberal member of the United States Senate — even more liberal than Teddy Kennedy or Hillary Clinton!"<sup>11</sup>
- o "'Starting today, their [the liberal 527 organizations'] free ride is over,' McCabe promised. 'We intend to raise millions for additional ads that will tell our side of the story and rebut this well funded liberal propaganda machine.'"<sup>12</sup>
- o "If anybody listening today wants to be the Republican George Soros, they can clearly give to the Progress For America Voter Fund at pfavoterfund.com, and we will gladly take their \$20 million."<sup>13</sup>
- o "Being behind the curve on what some of the liberal 527s did put us at a disadvantage, but now that we have formed and we're ready to go, we're getting enthusiastic response from the people we're talking to," he said.
- o "Mr. McCabe said his group has 'absolutely no coordination' with Mr. Bush's campaign. Two of the top advisers to Mr. McCabe's organization worked for President George H.W. Bush. C. Boyden Gray was a White House counsel. James Cicconi, now general counsel of AT&T, was a deputy chief of staff at the White House. [Jan] Baran said that the fund had tried to enlist top fund-raisers for President Bush but was rebuffed after lawyers said that such a relationship could prompt charges of illegal coordination with the campaign."<sup>14</sup>

## V. LEADERSHIP/OFFICERS

- o Brian McCabe, President<sup>15</sup>
- o Mary Anne Carter, Treasurer<sup>16</sup>
- o Ralph R. Brown, Secretary<sup>17</sup>
- o James C. Cicconi, Advisory Board<sup>18</sup>
- o C. Boyden Gray, Advisory Board<sup>19</sup>
- o Marilyn Ware, Advisory Board<sup>20</sup>

<sup>11</sup> <http://www.pfavoterfund.com/>

<sup>12</sup> <http://www.pfavoterfund.com/1151-15.1151-062804B.html>

<sup>13</sup> Statement by Brian McCabe. *NPR Morning Edition* (National Public Radio Broadcast, July 26, 2004), 2004 WL 56913951 (July 26, 2004).

<sup>14</sup> Josh Gerstein, *In 2004 Money Race, Republicans Begin Shoring Up Coffers of Their Own 527s*, N.Y. SUN, July 15, 2004 (page number unavailable), 2004 WL 82588541.

<sup>15</sup> IRS 8871 filed May 28, 2004.

<sup>16</sup> IRS 8871 filed May 28, 2004.

<sup>17</sup> Amended IRS 8871 filed July 13, 2004.

<sup>18</sup> <http://www.progressforamerica.org/pfa/wrapper.jsp?PID=1101-139&CID=1101-061706C>

<sup>19</sup> <http://www.progressforamerica.org/pfa/wrapper.jsp?PID=1101-139&CID=1101-061706C>

<sup>20</sup> <http://www.progressforamerica.org/pfa/wrapper.jsp?PID=1101-139&CID=1101-061706C>

## VI. SOURCE OF FUNDS

- o PFA-VF: \$72,070,250 in donations received from June 23 through October 29, 2004 including several individual contributions over \$1 million each.<sup>21</sup>

## VII. EXPENDITURES

- o PFA-VF: \$29,810,435 million in electioneering communications made covering the period from June 23 through October 29, 2004.<sup>22</sup>

## VIII. PUBLIC ADVERTISEMENTS BY PFA-VF<sup>23</sup>

“Why Do We Fight?” a commercial that backs Bush and criticizes Kerry, has aired in New Mexico and Nevada.<sup>24</sup>

Audio	Visual
Why do we fight? Years of defense and intelligence cuts left us vulnerable. We fight now because America is under attack. Positions are clear.	<i>Footage of the damage at the World Trade Center</i> <i>On screen: Years of defense and intelligence cuts left us vulnerable; We fight now because America is under attack</i>
A president, who fights to defeat terrorists before they can attack again.	<i>Footage of President Bush and Colin Powell</i> <i>On screen: Still picture of John Kerry;</i>
Or the nation's most liberal senator with a 30-year record of supporting defense and intelligence cuts.	<i>Or the nation's most liberal senator 30-year record of defense and intelligence cuts.</i>
The war is against terror. And President Bush has the strength and courage to lead us to victory.	<i>On screen: Picture of President Bush</i>
Progress for America Voter Fund is responsible for the content of this ad.	<i>On screen: Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content of This Ad.</i>

<sup>21</sup> <http://www.fec.gov/finance/disclosure/electioneering.shtml>

<sup>22</sup> <http://www.fec.gov/pages/electioneering.html>

<sup>23</sup> <http://www.pfavoterfund.com/1151-40.html>

<sup>24</sup> John McChesney, *NPR Morning Edition* (National Public Radio Broadcast, July 12, 2004), 2004 WL 56913657 (July 12, 2004). Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-04.mplarge.wmv>.

**“What If,”** a commercial that backs Bush and criticizes Kerry, aired on June 24, 2004.<sup>25</sup>

Audio	Visual
<p>9-11, a leader showed strength and compassion. President Bush. He held us together and began to hunt down terrorist killers.</p> <p>But what if Bush wasn't there? Could John Kerry have shown this leadership? The Kerry who voted against billions for America's intelligence even after the <i>first</i> World Trade Center bombing?</p> <p>The Kerry who voted against 13 weapons systems our troops depend on?</p> <p>President Bush will win this war on terror.</p> <p>Progress for America Voter Fund is responsible for the content of this ad.</p>	<p><i>On screen: PFAvoterfund.com</i></p> <p><i>Footage of President Bush at the World Trade Center with fire department personnel and with Colin Powell</i></p> <p><i>On screen: Could John Kerry have shown this leadership?</i></p> <p><i>Still picture of John Kerry</i></p> <p><i>The Kerry who voted against billions for America's intelligence even after the first World Trade Center bombing?</i></p> <p><i>On screen: Picture of President Bush</i></p> <p><i>On screen: Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate or Candidate's Committee; 877-792-3800</i></p>

**“Quiet Strength”** is a commercial that backs Bush and criticizes Kerry.<sup>26</sup>

Audio	Visual
<p>Howard Dean's scream. Al Gore's rant. And John Kerry, endlessly changing positions on Iraq.</p> <p>But beyond the partisan hysteria, there's real progress in Iraq.</p> <p>A brutal mass murderer deposed, schools reopened, women gaining rights.</p> <p>You don't hear much about that because bad news sells.</p> <p>The war is against terror, and President Bush has the quiet strength and courage to lead us to victory.</p> <p>Progress for America Voter Fund is responsible for the content of this ad.</p>	<p><i>Stills of Howard Dean and Al Gore. Multiple shots of John Kerry and “Endlessly changing positions on Iraq.”</i></p> <p><i>On screen: Look beyond the partisan hysteria</i></p> <p><i>Still photos of Iraqi children, Saddam Hussein, and Iraqi women.</i></p> <p><i>On screen: Bad news sells</i></p> <p><i>Stills of President Bush</i></p> <p><i>On screen: Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content of This Ad.</i></p>

<sup>25</sup> Jeanne Cummings, *Who Funded That Negative Ad?*, WALL ST. J., July 7, 2004, at A4. Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-03.mplarge.wmv>.

<sup>26</sup> Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

“Surfer Dude” is a commercial that criticizes Senator Kerry.<sup>27</sup>

Audio	Visual
<p><b>ANNOUNCER:</b> John Kerry's hobby? Windsurfing. Huh -- on issues, dude. He claims to be the Big Kahuna on terror but votes to cut defense and intelligence.</p> <p>The PATRIOT Act? Whichever way the wind blows, Kerry rides the wave, and Kerry surfs every direction on Iraq.</p> <p><b>JOHN KERRY</b> [at March 16 rally]: I actually did vote for the \$87 billion before I voted against it.</p> <p><b>ANNOUNCER:</b> Windsurfing. Fun on water. Bad on issues. Total wipeout, dude.</p> <p><b>CROWD</b> Total wipeout. Whoa.</p> <p>Progress for America Voter Fund is responsible for this surfing message.</p>	<p><i>On screen: John Kerry's hobby, windsurfing</i></p> <p><i>On screen: Kerry flip-flopped on PATRIOT Act</i></p> <p><i>On screen: Senator Kerry surfing</i></p> <p><i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i></p>

“Finish It,” a commercial that backs Bush and criticizes Kerry<sup>28</sup>

Audio	Visual
<p><b>ANNOUNCER:</b> These people want to kill us.</p> <p>They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans.</p> <p>John Kerry has a 30-year record of supporting cuts in defense and intelligence...</p>	<p><i>On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers and victims of terrorist attacks</i></p> <p><i>On screen: Pictures showing 911 attack on Twin towers and terrorist attacks in Russia and Spain</i></p> <p><i>On screen: Still Picture of Kerry; 30 years cuts in defense and intelligence</i></p>

<sup>27</sup> Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

<sup>28</sup> Jeanne Cummings, *Who Funded That Negative Ad?*, WALL ST. J., July 7, 2004, at A4. Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-03.mplarge.wmv>.

<p>... and endlessly changed positions on Iraq.</p> <p>Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.</p> <p>Progress for America Voter Fund is responsible for the content of this message.</p>	<p><i>On screen: Would you trust Kerry. Pictures of President Bush addressing the US military</i></p> <p><i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i></p>
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“Veterans” is a commercial that backs Bush and criticizes Kerry.<sup>29</sup> The ad ran for at least a week and a half across both Iowa and Wisconsin, with the buy in excess of \$1 million.<sup>30</sup>

Audio	Visual
<p><b>Announcer:</b> Four veterans from the frontlines of Iraq and Afghanistan.</p> <p><b>Veteran:</b> If we don't win the war on terror, then 911 is going to be a stepping-stone.</p> <p>President Bush will be the best man to lead us in the war against terror.</p> <p>President Bush sticks to his policies.</p> <p>I'd ask Senator Kerry why would you vote to go to war but vote not to support troops over there.</p> <p>I don't think that Senator Kerry has what it takes. He doesn't have the resolve.</p> <p><b>Announcer:</b> Progress for America Voter Fund is responsible for the content of this message.</p>	<p><i>On Screen: Four veterans from the frontiers of Iraq and Afghanistan.</i></p> <p><i>Background picture of four men dressed as veterans.</i></p> <p><i>On screen: Still picture of the showing the remnants of the twin towers after 911</i></p> <p><i>On screen: Picture of President Bush and Colin Powell; President Bush addressing the veterans</i></p> <p><i>On screen: Still picture of senator Kerry</i></p> <p><i>On screen: Still picture of President Bush</i></p> <p><i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i></p>

<sup>29</sup> Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

<sup>30</sup> <http://www.pfavoterfund.com/1151-15.1151-091304A.html>



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**“Tougher Hand”** is a commercial that backs Bush.<sup>31</sup>

Audio	Visual
Has any president been dealt with tougher hands? An economy already in recession; expensive health care; Sept. 11	<i>On screen: Background picture showing the swearing in of President Bush; Wall street graph showing an economy in recession.</i>
President Bush held us together and began to hunt down the terrorists. The Bush tax cuts help jumpstart the economy in recession and created nearly 2 million new jobs.	<i>On screen: President Bush with a fire service employee</i>
Thanks to Bush; forty one million seniors now have access to lower cost prescriptions.	<i>Background picture of President Bush signing a bill “Keeping our promise to seniors.”</i>
And George Bush has made America safer.	<i>On screen: Picture of a senior getting her prescription.</i> <i>Picture of Bush addressing the military.</i>
Progress for America Voter Fund is responsible for the content of this message.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>

<sup>31</sup> Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

**“Absolutely Incorrect”** is a commercial that backs Bush and criticizes Kerry.<sup>32</sup>

Audio	Visual
And I've never wavered in my life.	<i>On screen: Picture of Senator Kerry during the presidential debate.</i>
I actually did vote for the \$87 million before I voted against it.	<i>Background Picture of Kerry addressing the crowd at a campaign rally.</i>
You don't send troops to war without the body armor that they need.	<i>On screen: Kerry on funding our troops</i>
The President made judgment to divert forces from under General Tommy Franks.	<i>On screen: Kerry voted against the body armor for the troops in Iraq.</i>
And I've never wavered in my life.	<i>On screen: General Tommy Franks says Kerry is absolutely incorrect.</i>
I actually did vote for the \$87 million before I voted against it.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>
Progress for America Voter Fund is responsible for the content of this message.	

**“Ashley’s Story”** is a commercial that backs Bush.<sup>33</sup>

Audio	Visual
<b>LYNN FAULKNER:</b> My wife, Wendy, was murdered by terrorists on Sept. 11.	<i>On screen: Lynn Faulkner; picture of Wendy Faulkner with her two daughters</i>
<b>ANNOUNCER:</b> The Faulkners' daughter Ashley closed up emotionally. But when President George W. Bush came to Lebanon, Ohio, she went to see him as she had with her mother four years before.	<i>On screen: picture of Ashley reading a book; Bush at a campaign rally in Ohio</i>
<b>LINDA PRINCE:</b> He walked toward me and I said, "Mr. President, this young lady lost her mother in the World Trade Center."	<i>On screen: Linda Prince; Family Friend</i>
<b>ASHLEY FAULKNER:</b> And he turned around and he came back and he said, "I know	<i>On screen: Ashley Faulkner</i>

<sup>32</sup> Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

<sup>33</sup> Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

that's hard. Are you all right?"

**LINDA PRINCE:** Our president took Ashley in his arms and just embraced her. And it was at that moment that we saw Ashley's eyes fill up with tears.

**ASHLEY FAULKNER:** He's the most powerful man in the world and all he wants to do is make sure I'm safe, that I'm OK.

**LYNN FAULKNER:** What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.

**ANNOUNCER:** Progress for America Voter Fund is responsible for the content of this message.

*On screen: President Bush embracing Ashley Faulkner*

*On screen: Lynn Faulkner; picture of President Bush with a fire fighter*

*Footage of a newspaper with President Bush embracing a girl captioned "Bush comforts daughter of 9/11 victim"*

*On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.*

## IX. SOLICITATIONS

- Accepts online contributions that purportedly go toward launching TV ads. The following text appears next to a picture of George Bush on a TV screen: "YES, I would like to make a contribution to PFA Voter Fund to help launch TV ads. Just \$204.77 buys one TV ad in key media markets across the country."<sup>34</sup>

<sup>34</sup> <https://secure.securecontribution.com/voterfund/contribute1.jsp>

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 **RESPONDENT: Progress for America Voter Fund**

**MUR: 5546**

5  
6 **I. INTRODUCTION**

7 The Complaint alleges that Progress for America Voter Fund (PFA-VF) made  
8 coordinated expenditures in support of President Bush's 2004 re-election campaign that  
9 constituted illegal in-kind contributions to Bush-Cheney '04, Inc. and the Republican National  
10 Committee ("RNC"). Specifically, the Complaint asserts that PFA-VF may have coordinated its  
11 expenditures by utilizing the services of a direct mail and phone bank specialist named Tom  
12 Synhorst whose company, Feather, Larson & Synhorst, was a major vendor to both Bush-Cheney  
13 '04 and the RNC.

14 **II. FACTUAL AND LEGAL ANALYSIS**

15  
16 **A. FACTS**

17  
18 Progress for America Voter Fund (PFA-VF) is a Section 527 organization that does not  
19 maintain a federal account and is not registered with the Commission.<sup>1</sup> PFA-VF was formed on  
20 May 27, 2004. PFA-VF's officers include Brian McCabe, as President, Mary Anne Carter, as  
21 Treasurer, and Ralph R. Brown, as Secretary.

22 In its Post-General Election Report filed with the IRS on December 2, 2004, PFA-VF  
23 reported \$7,031,973 in receipts and \$6,628,627 in disbursements for the period from October 14,

<sup>1</sup> By law, a 527 organization is "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or Vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another.

2004 through November 22, 2004. PFA-VF also filed numerous electioneering communication reports with the Commission during the Fall of 2004 for millions of dollars in broadcast advertisements that promoted or supported Republican Presidential nominee President Bush and/or attacked or opposed Democratic Presidential nominee John Kerry.

In its Response to the Complaint in this matter, PFA-VF challenges the sufficiency of the allegations set forth in the Complaint and, without addressing any of the specific factual allegations, denies that any of its activities were coordinated with Bush-Cheney '04, Inc. or the RNC.

## **B. ANALYSIS**

### **1. Summary of Coordination Law**

Under the Act, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or party committee constitutes an in-kind contribution. *See* 2 U.S.C. §§ 441a(a)(7)(B)(i) and (ii). The regulations that implement the preceding statutory provisions define "coordinated" and prescribe the treatment of a "coordinated" expenditure as an in-kind contribution. *See* 11 C.F.R. § 109.20(a) and (b).

Although the definition of "coordinated" in Section 109.20 potentially encompasses a variety of payments made by a person on behalf of a candidate or party committee, many issues regarding coordination involve communications. The Commission therefore has promulgated separate regulations addressing "coordinated communications." 11 C.F.R. §§ 109.21-109.23. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test:

- (1) the communication is paid for by a person other than that candidate, authorized committee, political party committee, or agent thereof;

(2) the communication satisfies at least one of the four “content” standards described in Section 109.21(c);<sup>2</sup> and

(3) the communication satisfies at least one of the six “conduct” standards described in Section 109.21(d).

**2. Alleged Coordination by PFA-VF**

**a. The Payment Standard**

The standard for payment by a party other than a candidate, authorized committee, political party, or agent thereof would, by definition, be satisfied by any communications paid for by PFA-VF or TLF.

**b. The Content Standard**

The “content” standard includes: (1) an “electioneering communication;” (2) a “public communication” that disseminates campaign materials prepared by a candidate; (3) a communication that “expressly advocates” the election or defeat of a clearly identified federal candidate; and (4) certain “public communications,” distributed 120 days or fewer before an election, which refer to a clearly identified federal candidate (or political party). 11 C.F.R. § 109.21(c). The materials received to date substantiate that most, if not all, of PFA-VF’s communications would meet either the first (electioneering communication) or fourth (“public communications” mentioning a candidate within 120 days of an election) subparts of the content standard.

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<sup>2</sup> In *Shays v. FEC*, 337 F.Supp. 2d 28, (D.D.C. 2004) (D.D.C. Sept.18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court’s opinion. In a subsequent ruling, the Court explained that the “deficient rules technically remain ‘on the books,’” and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, 340 F. Supp. 2d 39 (D.D.C. Oct.19, 2004).

For example, the following television advertisement entitled "Finish It" was paid for by

PFA-VF:<sup>3</sup>

Audio	Visual
<b>ANNOUNCER:</b> These people want to kill us.	<i>On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers and victims of terrorist attacks.</i>
They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans.	<i>On screen: Pictures showing 9/11 attack on Twin Towers and terrorist attacks in Russia and Spain</i>
John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.	<i>On screen: Still Picture of Kerry; 30 years cuts in defense and intelligence</i>
Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.	<i>On screen: Would you trust Kerry? Pictures of President Bush addressing the US military</i>
Progress for America Voter Fund is responsible for the content of this message.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>

PFA-VF reportedly spent \$15 million on the Ashley's Story ad below,<sup>4</sup> which, according to surveys, made one of the strongest impressions on voters in key states<sup>5</sup>:

<sup>3</sup> Jeanne Cummings, *Who Funded That Negative Ad?*, WALL ST. J., July 7, 2004, at A4. Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-03.mplarge.wmv>.

<sup>4</sup> <http://www.washingtonpost.com/wp-dyn/articles/A28697-2004Nov5.html>; Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>.

<sup>5</sup> <http://www.washingtonpost.com/wp-dyn/articles/A29189-2004Nov5.html>

1

Audio	Visual
<b>LYNN FAULKNER:</b> My wife, Wendy, was murdered by terrorists on Sept. 11.	<i>On screen: Lynn Faulkner; picture of Wendy Faulkner with her two daughters</i>
<b>ANNOUNCER:</b> The Faulkners' daughter Ashley closed up emotionally. But when President George W. Bush came to Lebanon, Ohio, she went to see him as she had with her mother four years before.	<i>On screen: picture of Ashley reading a book; Bush at a campaign rally in Ohio</i>
<b>LINDA PRINCE:</b> He walked toward me and I said, "Mr. President, this young lady lost her mother in the World Trade Center."	<i>On screen: Linda Prince; Family Friend</i>
<b>ASHLEY FAULKNER:</b> And he turned around and he came back and he said, "I know that's hard. Are you all right?"	<i>On screen: Ashley Faulkner</i>
<b>LINDA PRINCE:</b> Our President took Ashley in his arms and just embraced her. And it was at that moment that we saw Ashley's eyes fill up with tears.	<i>On screen: President Bush embracing Ashley Faulkner</i>
<b>ASHLEY FAULKNER:</b> He's the most powerful man in the world and all he wants to do is make sure I'm safe, that I'm OK.	<i>On screen: Lynn Faulkner; picture of President Bush with a fire fighter</i>
<b>LYNN FAULKNER:</b> What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.	<i>Footage of a newspaper with President Bush embracing a girl captioned "Bush comforts daughter of 9/11 victim"</i>
<b>ANNOUNCER:</b> Progress for America Voter Fund is responsible for the content of this message.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund &amp; Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>

3  
4 In thirty electioneering communications reports filed with the Commission, PFA-VF  
5 listed \$72,070,250 in donations received and \$29,810,435 in electioneering communications

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1 made covering the period from June 23 through October 29, 2004. It appears that PFA-VF's  
2 primary activity was to fund television advertisements that clearly identified then-Republican  
3 Presidential candidate George Bush, then-Democratic Presidential Candidate John Kerry, or  
4 both.<sup>6</sup> All of the PFA-VF advertisements praised the quality of Bush's leadership as President  
5 after September 11, 2001 and questioned Senator Kerry's ability to provide similar leadership.  
6 The thirty electioneering communications reports PFA-VF filed with the Commission listed just  
7 two candidates, President Bush and Senator John Kerry. There was no information on the  
8 PFA-VF website about any other candidate for federal, state or local office.

9 Because PFA-VF reported spending millions of dollars for electioneering  
10 communications that satisfy the "content" standard, an analysis of the "conduct" standard is  
11 required to assess whether there is reason to believe any of the expenditures were coordinated.

12 c. The Conduct Standard<sup>7</sup>

13 Any one of six "conduct" standards will satisfy the third element of the three-part  
14 coordination test, "whether or not there is agreement or formal collaboration." 11 C.F.R.  
15 §§ 109.21(d) and 109.21(e). These conduct standards include: (1) communications made at the  
16 "request or suggestion" of the relevant candidate or committee; (2) communications made with  
17 the "material involvement" of the relevant candidate or committee; (3) communications made  
18 after "substantial discussion" with the relevant candidate or committee; (4) specific actions of a  
19 "common vendor;" (5) specific actions of a "former employee;" and (6) specific actions relating

<sup>6</sup> See <http://www.pfavoterfund.com/> for audio and video and Attachment 2 for additional ad transcripts.

<sup>7</sup> Because TLF appears to have made no disbursements for communications that satisfy the "content" standard, it is not necessary to examine the "conduct" standard. Notwithstanding this point, there is no information which suggests that TLF would satisfy the "conduct" standard

1 to the dissemination of campaign material. 11 C.F.R. §§ 109.21(d)(1)-(6). It is the fourth prong,  
2 actions taken through a “common vendor,” which warrants further investigation in this matter.

3 It appears that PFA-VF and Bush-Cheney utilized a common vendor. The Complaint  
4 alleges that Tom Synhorst, a direct-mail and phone-bank specialist, is a key strategic adviser to  
5 PFA-VF and is also partner in a firm that has major contracts with both Bush-Cheney and the  
6 RNC. Publicly available information reveals that Bush-Cheney and the RNC disbursed millions  
7 of dollars to Feather, Larson & Synhorst (FLS) during 2004. Public information also indicates  
8 that PFA-VF disbursed hundreds of thousands of dollars to FYI Messaging, LLC and DCI  
9 Group, LLC, two limited liability corporations registered in the State of Arizona under  
10 Synhorst’s name.

11 The “common vendor” subpart of the “conduct” standard regulation requires “[t]hat  
12 commercial vendor, including any owner, officer, or employee of the commercial vendor” to  
13 have provided one of the specified types of services discussed below. 11 C.F.R. § 109.21(d)(4).  
14 The applicable rules defining common vendors emphasize substance over form; where entities  
15 such as FLS, FYI Messaging and DCI Group appear to be closely related, including possible  
16 overlapping personnel (such as Mr. Synhorst), their particular organizational form will not  
17 prevent an investigation of whether the entities used information in the same manner as a  
18 common vendor. 11 C.F.R. § 109.21(d)(4).

19 In explaining its regulation, the Commission explicitly addressed situations such as  
20 Mr. Synhorst’s apparent simultaneous involvement with FLS and its work for Bush-Cheney and  
21 his involvement with FYI Messaging and DCI Group and their work for PFA-VF in which “a  
22 commercial vendor may qualify as a common vendor under 11 C.F.R. § 109.21(d)(4) even after  
23 reorganizing or shifting personnel.” Explanation & Justification (“E&J”), 68 Fed. Reg. 421, 435

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1 (Jan. 3, 2003). The Commission stated the regulation “focus[es] on the use or conveyance of  
2 information used by a vendor, including its owners, officers, and employees, in providing  
3 services to a candidate [or committee], rather than the particular structure of the vendor.” *Id.*  
4 This would seem to describe Mr. Synhorst’s simultaneous involvement with FLS and its work  
5 for Bush-Cheney and his involvement with FYI Messaging and DCI Group and their work for  
6 PFA-VF. *See* 11 C.F.R. § 109.21(d)(4)(iii).

7 Three elements must be present for a commercial vendor to be defined as a “common  
8 vendor” under 11 C.F.R. § 109.21(d)(4). First, the person paying for the communication must  
9 have employed or contracted with a commercial vendor to create, produce, or distribute the  
10 communication. 11 C.F.R. § 109.21(d)(4)(i). FYI Messaging is a direct-mail firm associated  
11 with DCI Group. DCI Group, LLC is a lobby and public relations firm. Brian McCabe,  
12 President of PFA-VF is a former DCI employee. Both organizations were founded by Thomas  
13 Synhorst and are engaged in the regular business of media consulting and advertising production;  
14 thus, they qualify as commercial vendors. 11 C.F.R. § 116.1(c).

15 Second, that commercial vendor must have provided any of certain enumerated services  
16 to the clearly identified candidate during the current election cycle. 11 C.F.R. § 109.21(d)(4)(ii).  
17 Based on disclosure reports, both Bush-Cheney and the RNC paid FYI Messaging and DCI  
18 Group millions of dollars in 2003. Given the publicly advertised nature of their services, these  
19 two organizations appear to have provided the type of services to Bush-Cheney, including  
20 development of media strategies, developing the content of public communications, producing  
21 public communications, identifying voters or developing voter lists, mailing lists or donor lists,  
22 and media consulting, that would qualify under the common vendor regulations. 11 C.F.R.  
23 § 109.21(d)(4)(ii)(A), (E), (F), (G) and (I).

1 Finally, that commercial vendor must have used or conveyed to the person paying for the  
2 communication:

3 (A) Information about the clearly identified candidate's campaign plans, projects,  
4 activities or needs . . . and that information is material to the creation, production, or  
5 distribution of the communication; or (B) Information used previously by the commercial  
6 vendor in providing services to the candidate who is clearly identified in the  
7 communication, or his or her authorized committee, . . ., or an agent of the foregoing, and  
8 that information is material to the creation, production, or distribution of the  
9 communication.

10  
11 11 C.F.R. § 109.21(d)(4)(iii). With regard to the allegations of coordination involving PFA-VF  
12 and Feather, Larson & Synhorst ("FLS"), the Bush-Cheney '04 appears to rely on its contract  
13 with FLS to ensure that it has not violated BCRA and Commission regulations. Although there  
14 is no indication that FLS took steps to isolate its activities from similar activities performed by  
15 FYI Messaging and DCI Group, the Commission has stated it "does not agree that the mere  
16 existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the  
17 enforcement of the limits on coordinated communications imposed by Congress" because such  
18 "arrangements are unlikely to prevent the circumvention of the rules." "E&J," 68 Fed. Reg. 421,  
19 435 (Jan. 3, 2003).

20 Because the first two parts of the "common vendor" test are met, there is a sufficient  
21 basis to investigate whether the use or exchange of information occurred as described in  
22 11 C.F.R. § 109.21(d)(4)(iii). If it did, all three parts of the coordination test will be met, and a  
23 portion of the costs of the coordinated communications would be a contribution from PFA-VF to  
24 Bush-Cheney. 2 U.S.C. § 441a(a)(7)(B)(i). Any portion of such an in-kind contribution which  
25 exceeds \$2,000 would constitute an excessive contribution in violation of 2 U.S.C.

- 1 § 441a(a)(1)(A). Therefore, the Commission finds reason to believe that Progress for America
- 2 Voter Fund violated 2 U.S.C. § 441a(a)(1)(A).